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Recommended Citation

Brief of Appellant, *Rasbury v. Bainum*, No. 9836 (Utah Supreme Court, 1963).

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IN THE SUPREME COURT OF THE STATE OF UTAH

GUINN RASBURY,
Plaintiff and Respondent,

— vs. —

MARVIN L. BAINUM,
Defendant and Appellant.

Supreme Court, Utah

UNIVERSITY OF UTAH

Case

No. 9836

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APPELLANT'S BRIEF

Appeal from Judgment of the Third District Court
for Salt Lake County, Utah
HONORABLE STEWART M. HANSON, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

GUINN RASBURY,
Plaintiff and Respondent,

— vs. —

MARVIN L. BAINUM,
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} Case
No. 9836

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action by the plaintiff, who was defendant's accountant, in two causes: (1) On a promissory note for funds allegedly put into the defendant's business by the plaintiff, and (2) For the reasonable value of the plaintiff's professional accounting services rendered to the defendant. The defendant counterclaimed for an accounting alleging the plaintiff had managed the fiscal affairs of his business and had control of its assets and had not accounted to or paid over the sums due the defendant.

DISPOSITION IN LOWER COURT

The lower court dismissed the plaintiff's first cause of action on the ground that he had violated the court's order to produce the defendant's records to be used at the trial of the case and on the further ground that the plaintiff had failed to prove by a preponderance of the evidence his right to recover. The lower court, however, granted judgment in favor of the plaintiff for the reasonable value of accounting services in the amount of \$1,300.00 and dismissed the defendant's counterclaim for an accounting.

RELIEF SOUGHT ON APPEAL

The defendant on appeal seeks to reverse the lower court's award for accounting services granted to the plaintiff and seeks judgment on his counterclaim for \$4,300.00 disclosed to have been collected from the defendant's assets and not paid over to the defendant and also seeks an order from this court remanding the case and requiring the plaintiff to account to the defendant for his management of defendant's business and its assets.

STATEMENT OF FACTS

The plaintiff and respondent, Guinn Rasbury, is an accountant who handled the financial affairs of the defendant and appellant, Marvin L. Bainum, and the financial affairs of two businesses owned by the defendant, Bainum.

The plaintiff, Rasbury, brought suit against the de-

fendant, Bainum, on two causes of action. One, to recover sums due under a promissory note given for sums allegedly advanced to Bainum by Rasbury, and two, to recover the reasonable value of professional services allegedly rendered to the defendant, Bainum, in doing the accounting for Bainum's businesses. The defendant, Bainum, counterclaimed against the plaintiff for an accounting alleging that he had turned over the assets of his business to the plaintiff, Rasbury, to manage for his benefit and alleging that he was entitled to an accounting of all of Rasbury's actions with reference thereto.

The pre-trial court ordered the plaintiff, Rasbury, to produce all of the books and records belonging to the defendant, Bainum, ten days before the trial of the case. The plaintiff, Rasbury, failed and refused to produce the records as ordered. The trial court rendered judgment against the plaintiff, Rasbury, on his first cause of action on the ground that he had wilfully failed to produce the records as ordered and on the further ground that plaintiff had failed to prove his case by a preponderance of the evidence. The trial court, however, rendered a judgment in favor of the plaintiff, Rasbury, and against the defendant, Bainum, for the reasonable value of professional accounting services rendered to Bainum in the amount of \$1,300.00 and interest. The trial court further dismissed the defendant's counterclaim for an accounting. The defendant-appellant, Bainum, appeals from the granting of a judgment against him on the second cause of action and appeals from the dismissal of his counterclaim against the plaintiff for an accounting.

The defendant, Bainum, employed the plaintiff, Rasbury, as an accountant in 1957 when he acquired a club known as the Club Silver Key. Thereafter the Tanglewild Key Club, a proprietorship owned by Bainum, was formed and the plaintiff, Rasbury, did the accounting work and assisted in the management and operation of the business, (R. 89). Some time prior to July 7, 1958, Rasbury established a proprietorship owned by himself and known as Houston Factors and approached Bainum, indicating to him that if Bainum would assign the accounts receivable of the business Rasbury would obtain operating capital needed by the business. Bainum agreed and executed a promissory note and an assignment of all of his accounts receivable then on the books and thereafter to accrue as security for the said note, (Ex. D-2 and Pre-trial Ex. 1). While the business was solvent and had a net asset value of approximately \$50,000.00 (R. 102, lines 20-23), by reason of the shortage of operating capital the defendant, Bainum, decided that he would secure employment in order that he would not have to draw compensation from the business and turned over the fiscal operation to Rasbury, (R. 132 to 138). Thereafter the club was shut down because of its inability to pay its creditors when due and Rasbury took over the burden of liquidating the assets and collecting the accounts receivable for Bainum. Rasbury was ~~authorized~~ ^{AUTHORIZED} to apply the collections against the note and to pay over the balance of all sums realized from the liquidation of the business to Bainum. On numerous occasions Bainum requested financial information and was always told that the records were being brought up

to date and the information was not yet available. The defendant, Bainum, served the plaintiff, Rasbury, with written interrogatories in order to obtain information with reference to the accounts receivable collected by Rasbury and in order to determine what records Rasbury had in his possession which belonged to Bainum, (R. 7). Rasbury replied to the interrogatories that he had only collected \$169.48 of the accounts receivable assigned to him and that he had all of the records belonging to Bainum, including the Tanglewild Key Club records, Silver Key Club records and personal records of Bainum. (See Answer Nos. 4 and 10, R. 9 and 10). At the pre-trial the court ordered the production of these records.

At the trial of the action Rasbury admitted collecting \$4,469.43 of Bainum's accounts receivable (Ex. P-4) and failed to produce the books and records ordered to be produced by the court, testifying that they were stolen from him. The plaintiff further failed to show the financial records to prove that he had actually loaned to Bainum the \$3,838.70 represented by the promissory note, yet admitted that he did have records in Houston, Texas that would have shown these financial transactions (R. 67) and stated that he had not brought these documents with him to establish that the funds actually came from his account rather than from Bainum's own business.

After both parties had rested, the plaintiff, Rasbury, telephoned the defendant, Bainum, stating in sub-

stance and effect that now the case was over they could freely discuss the case and he discussed the books and records which were allegedly stolen from his office and stated that a portion of these records were brought with him to Salt Lake City but not produced at the trial. Bainum upon being advised by a relative that evening that Rasbury was attempting to reach him by telephone arranged to record the conversation with Rasbury and the following morning Bainum moved to re-open the case to introduce the evidence of the conversation with Rasbury with reference to the missing records and the trial court denied Bainum's motion to re-open.

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT AND COUNTER-CLAIMANT, BAINUM, THE RIGHT TO AN ACCOUNTING FROM THE PLAINTIFF, RASBURY.

The defendant, Bainum, counterclaimed in this action for an accounting from his accountant, Rasbury. Prior to turning over his business to Rasbury, Bainum assigned to Rasbury all of the assets of his business consisting of all of the accounts receivable as of July 7, 1958, and those accruing to Bainum's business thereafter. This assignment was given to secure a promissory note and was made to Houston Factors Company, a proprietorship owned by the plaintiff, Guinn Rasbury, (Ex. D-2).

The plaintiff, Rasbury, in defense to this counterclaim admitted that he obtained an assignment of the

assets of Bainum's business and in his sworn answer to Bainum's interrogatories and at the pre-trial hearing represented that he had collected only \$169.48 of the accounts assigned to him. He further falsely swore that he had no idea as to the number of these accounts which were collected except for the \$169.48.

"4. *I have no idea as to how many of these accounts were collected* since Marvin Bainum collected most of them at the Tanglewild Key Club and used them to buy food and liquor and to operate the club. *I collected only \$169.48* and have applied this sum to this note". (Italics supplied.) (Answers to Interrogatories, R. 9).

"The plaintiff contends that he had nothing to do with the management of the business, that he was the accountant only for the defendant, and after having advanced money to the defendant as indicated by the note, that he took the assignment of the accounts receivable of the defendant's business for the purpose of applying the proceeds received therefrom to the note and that *the only money he ever received thereon is the sum of \$169.48*, which he has applied to the amount due and owing on the note". (Italics supplied) (Pre-trial Order, R. 19).

The defendant, Bainum, objected to the plaintiff's notice of readiness for trial on the ground that the plaintiff had not produced the books and records relating to the issues in the case and at the pre-trial hearing the court overruled the objection but made the following order:

"The plaintiff is ordered to furnish the defendant all books and records of the defendant now in

the possession of the plaintiff, and unless he does so at least ten days prior to the date of trial, the plaintiff will be denied the right to use any of these books and records in connection with establishing his case or any defenses thereto.” (Pre-trial Order, R. 20).

The plaintiff failed to produce the records prior to the trial as ordered by the court and at the trial admitted that the sworn statement in his answers to interrogatories and his representation to the court at pre-trial cited above to the effect that he had knowledge of only \$169.48 of accounts collected was false and that in truth and in fact he had collected \$4,469.43, (See Exhibit P-4). Exhibit P-4 was offered by the plaintiff, Rasbury, and purports to be a list of the accounts which Rasbury collected and applied first to a note allegedly owed to one Ed Lorehn and the balance to the note which was secured by the accounts receivable assigned to Rasbury.

“Q (By Mr. Gustin) Now how did you happen to come into possession of those receivables?

A Mr. Bainum handed, gave them to me, or told me to take them. They were there in that office. He told me to take these accounts receivable and collect all that you can on them and apply them on your note.” (R. 107, lines 14 to 19).

“Q And are those funds that were collected, are they reflected in that record?

A Yes”. (R. 108, lines 4 to 6).

The plaintiff, Rasbury, attempted to excuse his failure to produce the records ordered by the court to

be produced ten days prior to trial by explaining that a burglary had taken place and the records of Mr. Bainum's business were probably stolen.

“Q The records are all lost?

A Yes, sir.

Q Did you have a fire in the Neil Building?

A No, sir.

Q Did you have a burglary?

A Perhaps.

Q Perhaps? Did they jimmy the door?

A No.

Q Did you find the lock picked?

A No, sir.

Q But there was a burglary probably of all the books and records?

A A burglary, whatever you want to call it”.
(R. 53, lines 17 to 29).

When confronted with his sworn statement in his reply to defendant's interrogatories to the effect that he was holding the records (R. 10, answers 10 and 11) he explained that he did not know of the “burglary” until approximately October 5, 1962.

“Q Well now, did you report it to the police?

A No, because I didn't discover their being gone until a couple of months ago.” (R. 54, lines 11 to 13).

Rasbury did not explain why he had not called this to the attention of his attorney, the court at pre-trial, or defendant's counsel after being order to produce these records on October 31, 1962, or at any time before the trial which took place on December 5, 1962.

The court in considering Rasbury's testimony found that he lied with reference to his explanation as to the missing records and his excuse for their non-production.

"The court feels that the excuse given by the plaintiff is not worthy of consideration". (Memorandum Decision of trial court, R. 22).

It is the position of the defendant-appellant, Bainum, that the trial court should have ordered an accounting as prayed for in his counter-claim and denied Rasbury's claim for services rendered to Bainum.

It is fundamental law that an accountant occupies a fiduciary relationship to his client and must account to him for his actions relating to the client's business and especially for his handling of any funds of the client or of the client's business or businesses.

"*An accountant having charge of a client's personal accounts and of accounts of various corporations owned by the client occupies a fiduciary relationship to the client and is bound to account to him for funds withdrawn from such accounts, but not used for the client's benefit or deposited to another of the client's accounts.*" (Italics supplied) 1 *Am. Jur.*, 2d, Sec. 18, p. 367.

In the case of *Cafritz v. Corporation Audit Co.*, 60

Fed. Supp. 627, the court held that the accounting firm owed a duty to its client to account as a matter of law.

It should be noted that in this case the plaintiff, Rasbury, occupied a dual relationship with reference to his client. He was not only the accountant for Bainum, but he was the factor receiving the assignment of Bainum's assets and as such owes a duty to account to Bainum for his handling of Bainum's assets independent of his duties as an accountant.

"It is the duty of a factor to keep and render to his principal a true account of the dealings between them". 22*Am. Jur. Sec.* 38, p. 327.

It was Rasbury's duty to Bainum to keep books and records of all his transactions with reference to Bainum's assets which he was handling as the accountant and agent of Bainum.

"An agent is subject to the duty to keep records and render to his principal an account of all transactions within the scope of the agency as to which a fiduciary duty, in addition to the bare relation of principal and agent, exists, . . . An agent's duties in this connection extend to money or any other property which he has received or paid out on behalf of his principal, including interest received upon the money of the principal in the hands of the agent. It is not necessary for the principal to establish any mis-appropriation by his agent to entitle him to an accounting". 3 *Am. Jur. 2d, Sec.* 201, p. 583.

Even if the plaintiff, Rasbury, had not occupied a fiduciary relationship or had not been an agent of Bainum's

or a factor of Bainum's accounts receivable, he would still have the status of a trustee of Bainum's property by reason of his undertaking to collect the accounts receivable and handle the funds collected. When one party entrusts another with the handling of property, collection of accounts, or the operation of his business, a fiduciary trust relationship is created entitling the trustor to an accounting from the trustee. The case of *Mollohan v. Christy*, 294 P. 2d, 375, 80 Ariz. 141, was decided on facts remarkably similar to the facts in this case. The plaintiff, Christy, was the owner of property in Phoenix, Arizona. By reason of business reverses he left the State of Arizona and borrowed \$2,400.00 from Mullohan and in order to save property from his creditors deeded some of his property to Mollohan as security for the loan and instructed Mollohan to liquidate the property, pay himself the \$2,400.00, and to hold the remainder for him. The defendant, Mollohan, subsequently failed to account for his actions and contended that Christy was not entitled to an accounting because there was no confidential relationship existing between the parties. The Supreme Court in ruling that Christy was entitled to an accounting as a matter of law, said:

“Plaintiff put his Arizona affairs in the hands of defendant in the confidence that he would settle matters to the best advantage. There is no question as to Christy's right to an accounting from Mollohan, and the burden was on the latter to support with competent evidence the disbursements made.” *Mollohan v Christy*, 294 P. 2d, 375, p. 377.

The Utah Supreme Court in the case of *Simper v.*

Scorup, 1 P. 2d 941, 78 U 71 has also ruled that one who handles the business affairs of another is liable for an accounting and has the burden of proving the precise manner in which he handled the funds of the party entitled to the accounting. In that case the Supreme Court said:

“In a suit in accounting in equity the burden of proof is upon the defedant to account for all money or property of the plaintiff that has come into his hands. He has the burden of showing that he is entitled to credit for moneys charged in his account or as having been paid by him to or for the benefit of the plaintiff, *and the plaintiff does not have the burden of showing that the items charged were improper or that the defen-dant was not entitled thereto.* The defendant as the trustee of the plaintiff was required to show that he had performed his trust and the manner of its performance.” (Italics supplied) *Simper v. Scorup*, 1 P. 2d, 941, p. 945.

The *Simper* case is cited in 1 Am. Jur. Accounts and Accounting, Sec. 62, p. 437, as authority for the proposition that “the burden of proving the correctness of an account is upon the party making it.” Hence, the plaintiff, Rasbury, had the burden of proving to the court by original records and documents of all his receipts and disbursements and transactions with reference to his trusteeship before he should have been allowed to recover for any services to Bainum and having failed to establish the validity of the disbursement of \$4,300.00 of the funds received from collecting Bainum’s accounts the court should have, in addition to ordering an ac-

counting, entered a judgment in favor of Bainum for the \$4,300.00 admittedly received by Rasbury.

POINT II

THE PLAINTIFF, RASBURY, HAVING VIOLATED HIS DUTY TO HIS CLIENT, BAINUM, AND HAVING FAILED TO OBEY THE ORDERS OF THE COURT AND TO ACCOUNT TO BAINUM IS NOT ENTITLED TO A JUDGMENT FOR SERVICES RENDERED TO BAINUM AND THE TRIAL COURT ERRED IN THIS REGARD.

The trial court, after dismissing plaintiff's first cause of action in part on the ground that the plaintiff, Rasbury, had violated the order of the court in failing to produce the records, entered judgment in favor of Rasbury and against Bainum for the services allegedly rendered to Bainum and Bainum's businesses, which services were the very subject matter of Bainum's suit for an accounting. As heretofore stated in this brief, an accountant, especially when dealing with the assets of his client, owes a duty to account, including the delivery of records belonging to his client, in establishing the proper performance of his duties. As established in Rasbury's answers to interrogatories (R. 10) Rasbury admitted having the books and records belonging to Bainum, including the Tanglewild Key Club records, Silver Key Club records and personal records of Bainum. He states in his answer to the interrogatories "I would prefer not to release them to him now unless so ordered by the court as they are the evidence I need to present

in this action.” (R. 10). The court did order the production of those records (R. 19 and 20) and Rasbury failed and refused to produce the records, testifying that the records had been stolen from his office. The court found this was false and that his excuse for not producing the records “was not worthy of consideration”, (R. 22). This ruling clearly established that Rasbury violated his duty to Bainum and thereby forfeited any right to compensation for accounting services rendered to Bainum.

“An agent may lose his rights to commissions or other compensation if, in his dealing in reference to the subject matter of his employment, he is guilty of either fraud or bad faith toward his employer, or if he wilfully disregards an obligation owing his principal which, by reason of his agency, devolves upon him by law. *An agent may also forfeit his right to compensation by withholding information from his principal which it is his duty to disclose.*” (Italics supplied) 3 Am. Jur. 2d, Sec. 252, p. 618.

There can be no question that Rasbury had the books and records of Bainum in his custody and had control of the funds of Bainum which he was factoring for his own benefit as well as pursuant to his trusteeship. His refusal to obey the order of the court and his refusal to account to Bainum is a violation of his duty. The very essence of an accountant's duty is to preserve and maintain his client's fiscal records and to account to his client. In refusing to deliver the books and records and to account to his client Rasbury forfeited any claim to compensation for his professional services.

POINT III

THE COURT ERRED IN REFUSING THE DEFENDANT THE RIGHT TO RE-OPEN TO PRESENT NEWLY DISCOVERED EVIDENCE WHICH WOULD FURTHER PROVE THE WILLFUL REFUSAL OF RASBURY TO PRODUCE THE RECORDS AS ORDERED BY THE COURT AND WHICH WOULD FURTHER IMPEACH HIS TESTIMONY WITH REFERENCE TO THEIR LOSS.

Both parties rested their case on December 5th and the matter was set for argument the following morning. The following morning the defendant, Bainum, moved to re-open the case to introduce new evidence, which evidence would have established that the evening after both parties had rested Rasbury conversed with Bainum by telephone and stated, in substance and effect, that he had brought part of the records belonging to Bainum to Salt Lake City and that he did not know whether or not Bainum could obtain the records. The parties discussed the contents of the records and a recording of the telephone conversation was made by Bainum which Bainum proposed to testify to and offer in evidence, (R. 165 and 166).

Rasbury's counsel then conceded that they had records but stated that these records only pertained to the "Club Key Silver", (R. 165). The order of the court was clear that the plaintiff, Rasbury, was to deliver all records belonging to Bainum and the court did not exclude the records of Bainum's business known as the Silver Key Club. The court may well have felt

that there was sufficient evidence already that Rasbury had wilfully concealed and refused to deliver the records as ordered by the court because the court stated in its memorandum decision that Rasbury's explanation as to the missing records was "not worthy of consideration", (R. 22). However, the evidence should have been received for at least the purpose of further showing that Rasbury wilfully violated the order of the court and his duty to his client in refusing to deliver his client's records to him and should, therefore, not recover for professional services rendered to Bainum.

CONCLUSION

The trial court should have entered judgment in favor of the defendant and appellant, Bainum, on his counterclaim in the ~~amount~~^{AMOUNT} of \$4,300.00 which was realized by Rasbury from Bainum's assets assigned to Rasbury and should have ordered Rasbury to account to Bainum.

The plaintiff and respondent, Rasbury, should not be entitled to any payment for accounting services allegedly rendered to Bainum because of his wilfull refusal to make an accounting to his client, Bainum, and to produce the records ordered to be produced by the pre-trial judge.

This court should properly affirm the trial judge in dismissing the plaintiff, Rasbury's, first cause of action, should reverse the trial court in granting judgment on the second cause of action and dismiss the same, should

enter judgment against the plaintiff and respondent, Rasbury, for \$4,300.00 and order the said Rasbury to make an accounting to his client, Bainum, and remand the matter to the trial court for such accounting.

Respectfully submitted,

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